



court should consider the following circumstances when determining the monetary sanctions appropriate, all of which serve as limitations on the amount assessed:

- 1) reasonableness calculation,
- 2) minimum to deter,
- 3) ability to pay, and
- 4) other factors (i.e., offending party's history, experience, and ability, the severity of the violation, the degree to which malice or bad faith contributed to the violation, the risk of chilling the type of litigation involved).

*Id.* at 684-85.

The Court will take the above factors into consideration when imposing sanctions pursuant to Rule 16(f). The failure to timely provide Plaintiffs' expert, witness, and exhibit lists is clearly the error of counsel, not the Plaintiffs; therefore, the sanctions imposed by the court will be imposed against Plaintiffs' counsel—not Plaintiffs. *See, e.g., Kiser v. Boeing Co.*, 163 F.R.D. 13, 14-15 (D. Kan. 1995).

Plaintiffs filed this action on May 28, 2019, as representatives of the Estate of Isaiah Mark Lewis, alleging three counts under 42 U.S.C. § 1983: excessive use of force, a *Monell* violation, and an equal protection violation. Doc. No. 1, pp. 5, 6, 11. On August 12, 2020, this Court “reluctantly grant[ed] Plaintiffs’ Motion for Revised Scheduling Order [Doc. No. 25]” after determining that the “case [had] been on file for well over a year” and Plaintiffs had “done very little to pursue the matter.” Doc. No. 26, p. 1. The Revised Scheduling Order pushed Plaintiffs’ deadline to file their final list of expert-witnesses-in-chief and to provide expert reports to January 4, 2021. *Id.* p 2. In its prior Order, the Court stated that it “will enter sanctions up to and including dismissal of the case” if Plaintiffs’ conduct continued. *Id.* p. 1.

To date, after the availability of discovery for over 18 months, Plaintiffs “have taken one deposition ... and only recently scheduled a handful of other depositions...”. Doc. No. 38, p. 3. Again, this case was filed on May 28, 2019. Doc. No. 1. After missing the January 4<sup>th</sup> deadline to file expert, witness, and exhibit lists, Plaintiffs then filed, on January 8<sup>th</sup>, a “Motion for Leave to File Instanter”—Doc. No. 39—accompanied by “Plaintiff’s Trial Witnesses,” which includes *forty-three* potential witnesses. Doc. No. 39-1.

Plaintiffs’ counsel’s conduct is entirely unacceptable. The imposition of sanctions is not simply warranted, it is absolutely necessary to deter Plaintiff’s counsel from repeating such conduct. Still, the Court declines to grant Defendant’s Motion to Dismiss as Sanction because the Court finds that punishing Plaintiffs for the woefully inadequate pursuit of this case by Plaintiffs’ counsel would be unjust. Sanctions under Fed. R. Civ. P. 16(f), however, are necessary to reflect the seriousness of Plaintiffs’ counsel’s continued lack of cooperation with the Court. Accordingly, **IT IS SO ORDERED** that:

1. Plaintiffs, as Representatives of the Estate of Isaiah Mark Lewis, are hereby GRANTED the opportunity to replace Plaintiffs’ counsel based on counsel’s unacceptable conduct before the Court. Should Plaintiffs decide not to replace counsel and such conduct recurs, Plaintiffs’ case will be subject to dismissal.
2. Plaintiffs’ counsel is hereby ORDERED to file a certification with the Court—stating that counsel reviewed this Order with Plaintiffs and explained Plaintiffs’ opportunity to exercise option “1” outlined above—by February 9, 2021.
3. Plaintiffs’ counsel is hereby ORDERED to pay the reasonable costs incurred by Defendants’ counsel in the preparation of its Objection to Plaintiff’s Motion for Extension of Time for Scheduling Order Deadlines, Doc. No. 24; its Motion to Dismiss as Sanction and Reply in Support, Doc. Nos. 38, 43; and its Response to Plaintiff’s Motion for Leave to File Instanter, Doc. No. 41.

4. If the parties cannot agree as to reasonable fees, the Court shall be advised.

5. The deadlines in this case are CONTINUED as follows:

Plaintiff to file final list of expert witnesses-in-chief and provide expert reports	April 1, 2021
Defendants to file final lists of expert witnesses-in-chief and provide expert reports	April 15, 2021
Plaintiff to file final list of witnesses-in-chief, with address and summary of expected testimony for each witness who has not been deposed	April 1, 2021
Defendants to file final lists of witnesses-in-chief, with address and summary of expected testimony for each witness who has not been deposed	April 15, 2021
Plaintiff to file final list of exhibits and provide all listed exhibits	April 1, 2021
Defendants to file final lists of exhibits and provide all listed exhibits	April 15, 2021
Parties to file all objections to a final witness list or to a final exhibit list <u>14</u> days after the list is filed	
Parties to file all dispositive and <i>Daubert</i> motions	May 3, 2021
Trial docket	July, 2021
Parties to complete discovery	June 1, 2021
Designations of deposition testimony to be filed	June 17, 2021

Objections and counter-designations  
to be filed June 24, 2021

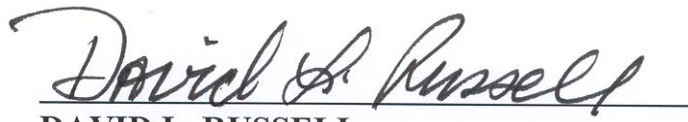
Requested voir dire, requested jury  
instructions and motions in limine July 1, 2021

Objections to requested voir dire,  
requested jury instructions and motions  
in limine July 6, 2021

Final Pretrial Report July 1, 2021

In conclusion, Defendants' Motion to Dismiss as Sanction [Doc. 38] is DENIED. However, monetary sanctions against Plaintiffs' counsel are necessary and hereby imposed, as set forth herein. Plaintiff's Motion to File Instante [Doc. 39] is DENIED AS MOOT.

**IT IS SO ORDERED** on this 19<sup>th</sup> day of January 2021.

  
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DAVID L. RUSSELL  
UNITED STATES DISTRICT JUDGE